S. B. Civil Second Appeal No.17/2002
(Dalla & Others. V. Legal Representatives of Devilal & Others)

Date of Order: :18-01-2007

HON'BLE MR. PRAKASH TATIA, J.

Mr. R.S. Mankad, for Appellants.
Mr.Shresh Shreemali, for Respondents.

Following substantial question of law is involved in this appeal :-

> " Whether the First Appellate Court committed error of law by not holding enquiry about the death of original plaintiffs Sava and Logar, despite the fact that the defendants in their memo of appeal before the First Appellate Court took a ground that Logar and Sava died during the pendency of the suit and the suit itself has abated before the date the judgment and decree was passed by the trial Court."

It appears from the facts of the case that original five plaintiffs filed the suit for injunction against the defendants No.1 to 3. The trial Court decreed the suit of the plaintiffs vide judgment and decree dated 26th August, 1994 and restrained the defendants from encroaching upon the land of plaintiffs and further restrained the defendants from interfering in the plaintiffs peaceful enjoyment of the property. The defendants, being aggrieved by the judgment and decree dated 26th August,

1994, preferred regular first appeal. In the memo of appeal, it was stated by the defendants appellants that during the pendency of the suit Sava and Logar – two plaintiffs died and, therefore, the decree of the trail Court deserves to be set aside as before passing the decree by the trial Court, the suit abated on the date when Sava and Logar died. The First Appellate Court, without holding enquiry, recorded the contention of the plaintiffs-respondents that Sava and Logar had not died during the pendency of the suit, but they died after the decree. The First Appellate Court, without holding any enquiry, merely because of the reason that the defendants appellant did not disclose the date of death of Sava and Logar, therefore, held that the suit has not abated as the defendants appellants failed to prove the death of Sava and Logar during the pendency of the suit.

Learned counsel for the appellants submits that it is admitted case that Sava and Logar died and admission of death of Sava and Logar is coming out in the memo of appeal itself filed by the defendants. It is also admitted case that the legal representatives of Sava and Logar have not been impleaded in the appeal before the First Appellate Court. The First Appellate Court held that the defendants failed to prove the death of Sava and Logar during the pendencyof the suit, then in any case, the

legal representatives were necessary parties and if Sava and Logar died after decree but before the defendants filing appeal, then they could have been impleaded as party straightway by the apellants defendants or they could have been impleaded as party by seeking permission of the First Appelllate Court under O.1, R.10, CPC. In case Sava and Logar died during the pendency of the appeal, then the first appeal abated.

Learned counsel for the respondents submitted that the appellants specifically pleaded that two plaintiffs – Sava and Logar – died during the pendencyof the suit and the First Appellate Court, without holding any enquiry, accepted the oral contention of remaining plaintiffs that Sava and Logar died after the decree.

Be it as it may be, the fact remained is that it is admitted case of both the parties that Sava and Logar were the plaintiffs and decree is in favour of Sava and Logar. It is also admitted case of both the parties that Sava and Logar died. There was specific contention in the memo of appeal by the defendants appellants before the First Appellate Court that suit stands abated because of the death of Sava and Logar. It is also admitted case that the defendants, after admitting death of Sava and Logar did not implead the legal representatives of Sava and Logar as party in the first appeal.

In view of these facts and circumstances, it was the duty of the First Appellate Court to hold an enquiry before deciding the appeal of the defendants, particularly when the First Appellate Court has allowed the appeal. The legal representatives of Sava and Logar were necessary party before the First Appellate Court, because without representation of Sava and Logar, the decree of the trial Court could not have been reversed, resulting into two contradictory decrees, one in favour of legal representatives of Sava and Logar and another in favour of the defendants.

In view of the above, the substantial question of law is decided in favour of the appellants and it is held that the judgment and decree of the First Appellate Court dated 11th October, 2001 has been passed, without impleading necessary party and without finding out the effect of death of Sava and Logar and without finding out whether Sava and Logar died during the pendency of the suit or died afterwards and if died afterwards, whether the legal representatives of Sava and Logar should have been impleaded as party.

In view of the above, the appeal is allowed. The judgment and decree of the First Appellate Court dated 11th October, 2001 is set aside. The first appeal is remanded to the First Appellate Court. The First Appellate Court shall hold an enquiry about the time of death of Sava and Logar, after giving opportunity to both

the parties to place on record evidence by way of affidavits and in case of need, by permitting cross-examination of deponents of the affidavits of both the parties. The trial Court may also take on record the documentary evidence, if produced by any of the parrties.

The First Appellate Court, thereafter, will decide the appeal afresh in accordance with law and examine the effect of its finding on the question referred to above.

Both the parties are directed to appear before the First Appellate Court on 20th February, 2007.

(PRAKASH TATIA), J.

Scd